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No. 90-842

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AIR WISCONSIN PILOTS PROTECTION COMMITTEE, JAMES M. FENSKE, GARY M. PELACH, RICHARD J. MAGIERA and THOMAS K. BLY,

Petitioners,

vs.

CLIFFORD R. SANDERSON, TRUSTEE and ACTING CHAIRMAN OF AIR WISCONSIN MASTER EXECUTIVE COUNCIL, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

I. THE SEVENTH CIRCUIT APPLIES A DUTY OF FAIR REPRESENTATION STANDARD MORE RESTRICTIVE THAN THAT OF ANY OTHER CIRCUIT

Respondents' contention that the decision herein did not apply the Seventh Circuit's subjective "intentional misconduct" doctrine rather than the contrary interpretation given by all other circuits having ruled upon the issue to the rule of Vaca v. Sipes, 386 U.S. 171, 177 (1967), is refuted by both opinions below. (Res. Br. pp. 5-7.)

The district court's opinion states (10a):

> "... the Seventh Circuit has limited suits for breach of the duty of representation to instances of intentional misconduct by the union. Dober Roadway Exp., Inc., 707 F.2d 292, 294 434 (7th Cir. 1983). Hoffman v. Lonza, Inc., 658 F.2d 519, 522 (1981)." [Emphasis added.]

The Seventh Circuit's opinion on appeal confirms that it also utilized the "intentional misconduct" standard in this case (5sa[1]):

> "The system that ALPA has created for determining seniority in a merged work force is not biased in favor of one group of workers or prejudiced against another. It was likely to yield an award in favor of Air Wisconsin's pilots as in favor of Mississippi Valley's. It is fair, and nothing more is required to comply with the duty of fair representation, since "so long as the union does not intentionally harm a member or class members, it will be deemed to have represented its members fairly." Olsen v. United Parcel Service, 892 F.2d 1290, 1294 (7th Cir. 1990). [Emphasis added.]

In addition to stating that unless a union acts to "intentionally harm" a member, "it will be deemed to have represented its members fairly," the

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[1]Citations followed by the suffix "sa" refer to the Supplemental Appendix filed by petitioners containing the Seventh Circuit's opinion, which is also reported at 909 F.2d 213 (7th Cir. 1990).

Seventh Circuit's opinion as quoted above expressly relied upon another Seventh Circuit decision, Olsen v. United Parcel Service, 892 F.2d 1290 (7th Cir. 1990).

Olsen also articulates the "intentional misconduct" doctrine as the rule of the Seventh Circuit (892 F.2d at 1296):

> "While the Union's decision not to investigate might have been an "error[] in judgment," Hines, 424 U.S. at 571, 96 S.Ct. at 1059, and perhaps even negligent representation, it falls short of the intentional misconduct standard adopted by this Circuit in Hoffman v. Lonza, 658 F.2d 519 (7th Cir. 1981) ..." (Emphasis added.)

Moreover, the Seventh Circuit judge who wrote the opinion in Olsen was the same judge who wrote the footnote in the opinion in Thomas v. United Parcel Service, Inc., 890 F.2d 909 (7th Cir. 1989), which explicitly states that the

Seventh Circuit is "the only circuit ... to require proof of intentional misconduct." (890 F.2d at 922, fn. 5.)

Thus, if the courts below were applying some other standard, they clearly would have said so, instead indicating the contrary to be the case.

Certiorari therefore should be granted to determine whether the subjective "intentional misconduct" doctrine which the Seventh Circuit is the lone circuit to apply in Duty of Fair Representation cases is incorrect, or whether virtually every other circuit should be brought into line with the Seventh Circuit's rule.

II. THE DECISION BELOW ALSO CONFLICTS WITH OTHER CIRCUITS ON AN ISSUE OF CONTRACT INTERPRETATION

Respondents' brief relegates to a footnote (Res. Br. fn. 1, p. 5) the important issue involving the Seventh Circuit's mis-use of summary judgment in a case presenting disputed fact issues involving the rights of union members that rest upon the interpretation of a union constitution and related documents.

As pointed out in the Petition herein (Pet. pp. 56-58), other circuits deny summary judgment when confronted with disputed fact issues involving the interpretation of ambiguous contractual rights.

Indeed, the passage from the Seventh Circuit opinion quoted in respondents' brief (Res. Br. pp. 8-9) includes citations to four cases that on

examination state that summary judgment may not be granted when there are outstanding issues of fact involving the interpretation of a contract.

The ambiguity involved in the pertinent document relied upon by respondents is revealed inadvertently by their brief which repeatedly mis-cites the document as the "ALPA Merger Policy." (Res. Br. pp. 2, 3, 7, fn. 3.)

However, the correct title of the document is not a singular "ALPA Merger Policy," but is a plural Merger Policies. (Seventh Circuit Appendix, p. 102; a copy of the title page of the document is annexed hereto as Appendix A.) Nor is the title of the document limited to "Merger Policies;" in its entirety the title reads "Merger Policies and Related Employee Protective Provisions."

Moreover, the "Related Employee Protective Provisions" as found in the document are not limited to a single source, or even a single unit within ALPA, but constitute a hodgepodge of pronouncements distilled from the edicts issued by various bodies within ALPA from time to time over the years. (Seventh Circuit Appendix, A-102, et seq.)

Respondents' contention that this eclectic collection of summaries overrides the direct language used in the ALPA Constitution and By-Laws (Res. Br. p. 7, fn. 3) in itself represents a remarkably curious canon of constitutional interpretation.

The further assumption that these congeries of statements speak with such bright line clarity that the rights of individual members arising thereunder

may be appropriately resolved by summary judgment is contrary to the decisions of every circuit that may be even remotely considered to be analogous, whatever standard of interpretation is considered to be applicable.

With regard to the applicable standard of interpretation, respondents' discussion of United Ass'n of Journeymen v. Local 334, United Ass'n of Journeymen, 452 U.S. 615 (1981), cited in respondents' brief (Res. Br. pp. 8-9 and fn. 5), itself demonstrates the importance of review of the important issues raised here that were left open by that decision.

Under respondents' a priori reasoning (Res. Br. p. 8, fn. 5), courts have virtually no jurisdiction to interpret contract claims by union members against the unions to which they

pay very substantial dues for the performance of various services, thereby depriving such union members of one of the chief benefits of the rule of law in a free society.[2]

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[2]Respondents argue that such claims are barred by a six-month statute of limitations. (Res Br. p. 8, fn. 4.) However, as noted in petitioners' initial brief, the contractual issues concerning the union's obligation to bargain concerning the seniority rights of its members under the ALPA Merger Policies has prospective application to the negotiation of future contracts and, therefore, would not be time-barred. Initial Brief, pp. 42-44, and 56.

Moreover, the interpretation of such provisions is directly involved in the action by ALPA in imposing the trusteeship herein on November 25, 1986, and the instant action was brought in April 1987, well within six months thereafter. (Seventh Circuit Appendix, A-2, 23.)

The further argument in footnote 5 on page of respondents' brief that Journeymen is inapplicable because it did not involve union members in a contract dispute with the international but rather union locals and in any event was decided under Section 301(a) of the Labor Management Relations Act, not the Railway Act, which (footnote continued)

III. RESPONDENTS' LANDRUM-GRIFFIN ARGUMENTS IGNORE THE CONFLICTS BETWEEN THE SEVENTH CIRCUIT'S DECISION AND DECISIONS FROM OTHER CIRCUITS

Respondents' arguments fail to address the conflicts between the Seventh Circuit's decision and those in other circuits involving the

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(footnote from prior page) has no such provision, is misplaced also.

Clearly, union members can raise contract disputes with their international union. See Loretangeli v. Critelli, 853 F.2d 186, 187 (3d Cir. 1988) ("The primary question raised is the scope of the "good cause" prerequisite to the institution of federal suits by union members against union officials under the Labor Management Reporting and Disclosure Act"). (Emphasis added.)

As to the contention that contract claims raised under Section 301(a) are distinguishable, Section 301(a) has also been held to apply to cases falling under the Railway Labor Act. United Independent Flight Officers, Inc. v. United Airlines, Inc., 756 F.2d 1262 (7th Cir. 1985).

infringement of the union democracy guarantees of the Landrum-Griffin Act. (Res. Br. 9-11.)

Both Lamb v. Miller, 660 F.2d 792, 794 (D.C. Cir. 1984), and Hotel & Restaurant Employees & Bartenders v. Rollison, 615 F.2d 788, 793 (9th Cir. 1980), hold that summary judgment may not be granted upon a showing of bad faith in removing or otherwise silencing union dissidents, as here presented.

As stated in Lamb v. Miller (660 F.2d at 794):

> "When there is some evidence that the reason for removal from office was permissible and some evidence that the reason was impermissible, the question whether protected activities were a cause for the removal must be resolved by the trier of fact. The motivation of the dismissal is thus a question of fact." (Citations omitted; emphasis added.)

Pignotti v. Local 3, Sheet Metal Workers, 343 F. Supp. 236, 242-3 (D.

Neb. 1972), aff'd, 477 F.2d 825 (8th Cir.), cert. denied, 414 U.S. 1067 (1973), and Sabolsky v. Budzanski, 457 F.2d 1245 (3d Cir.), cert. denied, 409 U.S. 853 (1973), also emphasize the importance of the protection of the free speech and voting rights afforded by the Landrum-Griffin Act to union members.

Respondents' brief does not disagree that the Seventh Circuit's decision is inconsistent with the four decisions from other circuits cited above, nor does it discuss those cases, although they were discussed at pages 45-47 of the Petition for Certiorari.

Supreme Court review is warranted by the inconsistency between the decisions in other circuits and the Seventh Circuit's decision in adjudicating Landrum-Griffin rights infringed by the imposition of a four-year union

trusteeship that admittedly was imposed to block the exercise of free speech and voting rights claimed by union members.

IV. RESPONDENTS' ARBITRATION AWARD ARGUMENTS POINT UP THE NEED FOR REVIEW

The "Question Presented" in respondents' brief adopts the view that petitioners' desire to seek changes in future contracts through collective bargaining would "nullify" a 1985 arbitration award. (Res. Br. p. (i).)

It is not denied by respondents that the arbitration award became embodied in a bargaining agreement that has since expired. Thus nothing was "nullified." The award was given full force and effect during the term of the contract.

Petitioners submit that the version of the "Question Presented" as stated in

respondents' brief itself demonstrates the importance of review by this Court.

Whether, as respondents contend, an arbitration award can forever obviate the mandatory bargaining duties imposed by the Railway Labor Act upon a statutory bargaining representative is a matter of no little importance in the proper operation of the collective bargaining system.

While the proper place of labor arbitration has been recognized, the statutory scheme of the Railway Labor Act gives far greater importance to performance of the duty of collective bargaining as the means relied upon to obviate interruptions to interstate commerce (45 U.S.C. § 152, First).

The "Trilogy" cases of course confirm the importance of labor arbitration (Petition, p. 35), but the award here

involved is not the product of the traditional kind of labor-management arbitration involved in the Trilogy cases and their progeny. Instead, the arbitration herein results from an intra-union dispute situation for which there is no provision in either the Railway Labor Act or the National Labor Relations Act, as amended.

Moreover, the Trilogy arbitrations were all "rights" arbitrations as opposed to an "interest" arbitration such as is here involved. (Pet., pp. 35-36.)

Whether the result of such an arbitration can be used to bar forever the performance of the statutory bargaining duties of a bargaining representative warrants, as the issue has never previously been decided.

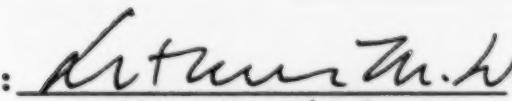
CONCLUSION

The petition for a writ of certiorari should be granted.

January 17, 1991

Respectfully submitted,

WISEHART & KOCH

By: 

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APPENDIX A

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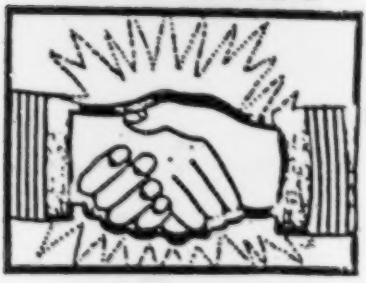
Air Line Pilots
Association

MERGER POLICIES



and Related
Employee Protective
Provisions

January 1985